(1)

Supreme Court, U.S.
FILED

No. 991795 MAY 08 2000

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In The Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

DEMEKA JOHNSON,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Given this Court's rulings that arbitration agreements should be enforced according to their terms, did the Fourth Circuit err when it held that an arbitration agreement is unenforceable solely because it limits available remedies?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fourth Circuit. Before the district court, additional plaintiffs were: Eric Brooks; Reginald Derrickson; Mohmed Ibrahim; Maxine James; Artis Kendall; Bernard Livingston; Harold Moore; Stanley Sims; Steven Taylor; H. Alexander Richardson. Circuit City Stores, Inc. ("Circuit City"), which has a wholly owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City group common stock tracks the performance of Circuit City, while CarMax group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

DEMEKA JOHNSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, Circuit City Stores, Inc. ("Circuit City"), respectfully requests that this Court grant this Petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on January 12, 2000.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA"), provides, in pertinent part:

> *Section Two* . . . [A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

42 U.S.C. § 1981 (1994) ("Section 1981") provides, in relevant part:

> *(a) Statement of Equal Rights* All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

OPINIONS BELOW

The Order and Memorandum Opinion of the United States District Court for the District of Maryland were entered on March 19, 1999. The decision of the United States Court of Appeals for the Fourth Circuit affirming the district court's decision was entered on January 12, 2000. Circuit City's petition for rehearing *en banc* was denied by order filed February 8, 2000.[1]

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 2000. Circuit City's petition for rehearing *en banc* was denied by order filed February 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATEMENT OF THE CASE

On September 6, 1995, Respondent Demeka Johnson ("Johnson"), an African-American female, applied for a sales position in Circuit City's Beltsville, Maryland store. (App. at 9a). By signing Circuit City's Dispute Resolution Agreement (the "Agreement") as part of her application for employment with Circuit City, Johnson promised "to arbitrate any legal dispute related to [her] application for employment or employment with Circuit City." Id.

Despite the fact that Circuit City offered Johnson employment, she joined a group of current and former Circuit City employees who brought suit in the United States District

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[1] All opinions below are reprinted in the Appendix. Citations to the Appendix appear hereinafter as follows: "App. at _."

Court for the District of Maryland, alleging that Circuit City discriminated against them in violation of federal law. Johnson's position in the lawsuit is unique in that she is the only plaintiff who never was employed by Circuit City, but rather was an applicant for employment. Johnson claims that Circuit City discriminated against her because of her race in violation of Section 1981. (App. at 5a).

On November 20, 1996, Circuit City sought dismissal of Johnson's claim because she was bound by the Agreement to arbitrate her claims. After all of Johnson's other objections to the enforceability of the Agreement had been rejected, the district court held:

> The failure of the Circuit City arbitration provision to provide [unlimited punitive damages and three years of back-pay] shields Circuit City from the full force of Section 1981 and prevents Plaintiff from effectively vindicating her rights. Therefore, the provision is invalid.

(App. at 6a-7a). Rule 14 of the Dispute Resolution Rules and Procedures provides the following description of available remedies:

> If the Arbitrator finds for the Associate, the Arbitrator, in his discretion, may award one or more of the following:
>
> 1. Injunctive relief, including reinstatement to the position of employment the Associate held or, if such reinstatement is impractical, to a comparable position at the location of the Associate's last employment;

2. If reinstatement at the place of the Associate's last employment is not practical, reinstatement to a comparable position at Circuit City in the same general geographic market area;

3. Full or partial back pay and reimbursement for lost fringe benefits, but only up to one year from the point at which the Associate knew or should have known of the events giving rise to the alleged violation of law, with interest, reduced by interim earnings, public or private benefits received, and amounts that could have been received with reasonable diligence;

4. If reinstatement is not practical or reasonable under the circumstances, recognizing that in only rare cases will reinstatement be impractical but nevertheless warranted, the Arbitrator may award up to 24 months of front pay in lieu of reinstatement;

5. Compensatory damages in accordance with applicable law;

6. Punitive damages in an amount up to the greater of:

   (a) an amount equal to the monetary award, if any, rendered pursuant to Subsections 3 and/or 4 of this Rule; or
   (b) $5,000.

(JA 126).[2]

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[2] "JA" [cites] refers to the Joint Appendix on file with the Fourth Circuit

On appeal, the Fourth Circuit stated, "[W]e affirm on the reasoning of the district court." (App. at 7a). Circuit City's petition for rehearing *en banc* was denied by order filed February 8, 2000. This petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit follows.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Ruling Directly Conflicts With Supreme Court Authority Requiring Arbitration Agreements To Be Enforced According to Their Terms

Section 2 of the FAA provides, in relevant part, that:

> . . . [A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994). This Court repeatedly has stated that the purpose of the FAA was to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); Allied-Bruce Terminix Companies v. Dobson, 513 U.S. 265, 270-71 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-220 (1985); Scherk v. Alberto-Culver Co., 417

Court of Appeals.

U.S. 506, 510 n.4 (1974); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967). The Fourth Circuit's holding that the Agreement was unenforceable, based solely on the damage limitation to which the parties agreed, directly conflicts with the strong and consistent rulings of this Court requiring that arbitration agreements be enforced according to their terms the same as any other contract.

In Volt Information Sciences, Stanford University entered into a construction contract under which Volt Information Sciences agreed to install electrical systems on the Stanford campus. 489 U.S. at 470. The contract contained an agreement to arbitrate all disputes arising out of the contract. Id. The contract also contained a choice-of-law clause providing that the contract would be governed by California state law. When a dispute arose, Stanford moved to stay arbitration pursuant to a California statute which applied because of the choice of law provision. Opposing the stay, Volt argued that the California statute was pre-empted by the FAA. Id. Rejecting Volt's position that the FAA precluded enforcement of the state statute, this Court concluded that the Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms":

> While Congress was no doubt aware that the [FAA] would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from

> excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.
>
> . . .[T]he FAA's primary purpose [is to ensure] that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. . . . By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties without doing violence to the policies behind the FAA.

489 U.S. 468, 478-79 (citations omitted).

Similarly, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, this Court ruled that antitrust claims arising under the Sherman Act, 15 U.S.C. § 1, et seq. (1994), and encompassed within a valid arbitration clause were arbitrable under the FAA. 473 U.S. 614 (1985). In Mitsubishi, this Court held that statutory claims were arbitrable under the FAA and set forth the proper tasks of a court asked to compel arbitration of a dispute:

> [W]e find no warrant in the [FAA] for implying in every contract within its ken a presumption against arbitration of statutory claims. . . . The "liberal federal policy favoring arbitration agree-

ments," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983), manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." Id. at 25, n.32. As this Court recently observed, "[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)...

Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make that determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Memorial Hospital, 460 U.S. at 24. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400-404 (1967); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984)...

Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability...

[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative

means of dispute resolution. . . [A]bsent [] compelling considerations, the [FAA] itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. See Wilko v. Swan, 346 U.S. at 434-435; Southland Corp., 465 U.S. at 16 n. 11; Dean Witter Reynolds, Inc., 470 U.S. at 224-225 (concurring opinion). For that reason Soler's concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. See Wilko v. Swan, supra.

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 625-28.

In the instant case, the district court, in reasoning adopted by the court of appeals, focused on a single sentence from Mitsubishi which was quoted in Gilmer: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." Id. at 628. Indeed, the very basis upon which both the district court and the Fourth Circuit held that the Agreement's damages provision was unenforceable was that the limitations in the Agreement prevented Johnson from "vindicating her rights." (App. at 6a). A careful and contextual reading of that language as it appears in Mitsubishi, however, reveals that this Court's ruling requires enforcement of the Agreement.

First, given its context, it is clear that the Mitsubishi language relied upon below refers only to the procedural differences that necessarily exist between arbitration and litigation. That language certainly was not intended by this Court to be utilized by other courts to reinvigorate the "longstanding judicial hostility to arbitration agreements" or to prevent lower courts from enforcing arbitration agreements according to their terms. Volt, 489 U.S. at 478. Second, Mitsubishi expressly states that lower courts should look to Congressional intent to identify the substantive protection afforded by a given statute. Nothing in the text or legislative history of the statute at issue here identifies unlimited punitive damages as a substantive right. In fact, a conclusion

that Congress intended the substantive protection afforded by Section 1981 to be the ability to recover unlimited punitive damages would be inconsistent with the Civil Rights Act of 1991, Section 118 of Public Law 102-166, which amended Section 1981, and which specifically encourages arbitration of employment disputes brought under Section 1981: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."

In Gilmer v. Interstate/Johnson Lane Corp., this Court stated that the FAA requires enforcement of agreements to arbitrate except in cases where: (1) Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue; or (2) the arbitration agreement is unenforceable on such grounds as exist at law or in equity for the revocation of any contract, in accordance with the provisions of the FAA, 9 U.S.C. § 2. 500 U.S. 20, 24-26 (1991). Indeed, the Fourth Circuit, in previously ruling that the Agreement was supported by adequate consideration, recognized that challenges to agreements to arbitrate properly are resolved by reference to contract law, "[w]hether a party agreed to arbitrate a particular dispute is an issue . . . to be decided as a matter of contract. In so deciding, the court should apply ordinary state-law principles that govern the formation of contracts." Johnson v. Circuit City Stores, 148 F.3d 373, 377 (4th Cir. 1998) (citations omitted).

In this case, however, the Fourth Circuit disregarded the clear edict of this Court that arbitration agreements are to be enforced according to their terms. Here, the Fourth Circuit did not find that Congress has evinced an intention to preclude a waiver of judicial remedies for statutory discrimination claims brought under Section 1981. Nor did the

Fourth Circuit determine that the Agreement is unenforceable on such grounds as would require revocation of any contract. Rather, the Fourth Circuit improperly created a third basis for invalidating arbitration agreements by ruling that, to be enforceable, arbitration agreements must provide remedies identical to those available in court.

This Court's unequivocal holding in Gilmer was that a plaintiff was bound by his agreement to arbitrate an age discrimination claim brought under the Age Discrimination in Employment Act ("ADEA") because (1) the FAA manifests a liberal federal policy favoring arbitration, (2) neither the text nor the legislative history of the ADEA explicitly precludes arbitration, and (3) the arbitration agreement was a valid, enforceable contract. 500 U.S. at 24-26. The same holds true for Circuit City's Agreement. The text and legislative history of the Civil Rights Act of 1991 specifically encourage arbitration, and the Agreement is a valid, enforceable contract. Therefore, under Gilmer, Volt, and Mitsubishi, the Fourth Circuit should have enforced the Agreement according to its terms and required Johnson to arbitrate her Section 1981 claims.

II. The Fourth Circuit's Ruling Is Part of a Recent and Expanding Intolerable Conflict Among the Circuits Concerning Whether Remedies Must Be Identical in the Arbitral and Judicial Forums

Review of the Fourth Circuit's decision is warranted for a second and separate reason. By holding that remedies available in arbitration must be identical to those available in court, the Fourth Circuit has contributed to an intolerable conflict among the circuits on this issue.

Two circuits have rejected a requirement that arbitral remedies must be identical to judicial remedies. In Baravati v. Josephthal, Lyon & Ross, Inc., the Seventh Circuit considered an arbitration agreement that precluded the award of punitive damages. 28 F.3d 704, 709 (7th Cir. 1994). In that case, the Seventh Circuit unequivocally ratified the right of parties to stipulate to the procedures which govern the arbitration of their disputes:

> Indeed, short of authorizing trial by battle or ordeal, or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify the idiosyncratic terms of arbitration as they are to specify any other terms in their contract. For that matter, parties to adjudication have considerable power to vary the normal procedures, and surely can stipulate that punitive damages will not be awarded.

Id. (citations omitted). See also Farrell v. Convergent Communications, Inc., No. C98-2613 MJJ, 1998 U.S. Dist. LEXIS 17314, at *14 (N.D. Cal. Oct. 29, 1998) (concluding that "limitations on the amount of damages alone does not render an agreement to arbitrate [employment-related disputes] per se unconscionable, as parties are generally free to contract as they see fit").

Similarly, in Great Western Mortgage Corp. v. Peacock, the Third Circuit recognized that the availability of punitive damages should not enter into a court's decision to compel arbitration. 110 F.3d 222, 232 (3rd Cir.), cert. denied, 522 U.S. 915 (1997). In Great Western the Third Circuit considered the enforceability of an arbitration agreement that

prevented complainants from recovering punitive damages for statutory employment discrimination claims. Id. The court enforced the arbitration agreement, stating:

> The availability of punitive damages is not relevant to the nature of the forum in which the complaint will be heard. Thus availability of punitive damages cannot enter into a decision to compel arbitration. . . . [T]he issue [] is separate and apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide. . .

Id.

More recently, however, straying from the consistent reasoning of the Third and Seventh Circuits, the Eleventh Circuit declined to enforce an arbitration agreement that proscribed the award of statutory damages. Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998). In Paladino, the Eleventh Circuit stated that failure to offer identical remedies in the arbitral forum was "unlawful." Id. at 1058. The Eleventh Circuit concluded that the presence of an "unlawful provision" in the arbitration agreement "serve[d] to taint the entire agreement, rendering the entire agreement unenforceable." Id. Thus, the Fourth Circuit's decision contributes to an intolerable conflict among the circuits for employers.

CONCLUSION

For the foregoing reasons, Circuit City respectfully requests that this Court grant certiorari in this case.

Respectfully submitted,

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May 8, 2000

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 8, 2000

No. 99-1449
CA-95-3296-DKC

DEMEKA JOHNSON
Plaintiff - Appellee

and

ERIC BROOKS; REGINALD DERRICKSON; MOHMED IBRAHIM; MAXINE JAMES; ARTIS KENDALL; BERNARD LIVINGSTON; HAROLD MOORE; STANLEY SIMS; STEVEN TAYLOR; H. ALEXANDER RICHARDSON
Plaintiffs

v.

CIRCUIT CITY STORES, INCORPORATED
Defendant - Appellant

- - - - - - - - - - - - - - - - - -

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Amicus Curiae

On Petition for Rehearing En Banc

Appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEMEKA JOHNSON,
Plaintiff-Appellee,

and

ERIC BROOKS; REGINALD DERRICKSON; MOHMED IBRAHIM; MAXINE JAMES; ARTIS KENDALL; BERNARD LIVINGSTON; HAROLD MOORE; STANLEY SIMS; STEVEN TAYLOR; H. ALEXANDER RICHARDSON,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

No. 99-1449

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Deborah K. Chasanow, District Judge.
(CA-95-3296-DKC)

Argued: December 2, 1999

Decided: January 12, 2000

Before WIDENER and MICHAEL, Circuit Judges,
and HAMILTON, Senior Circuit Judge

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: David E. Nagle, LECLAIR RYAN, Richmond, Virginia, for Appellant. Brian H. Corcoran, HOWREY & SIMON, Washington, D.C., for Appellee. Robert John Gregory, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. **ON BRIEF:** Ellen Duffy McKay, LECLAIR RYAN, Richmond, Virginia; Rex Darrell Berry, DAVIS, GRIMM & PAYNE, Seattle, Washington, for Appellant. William R. O'Brien, Patricia G. Butler, HOWREY & SIMON, Washington, D.C.; Warren Kaplan, THE WASHINGTON LAWYER'S COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, Washington, D.C., for Appellee. C. Gregory Stewart, General Counsel, Vincent J. Blackwood, Assistant General Counsel, Jodi B. Danis, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

On October 31, 1995, a group of current and former employees of Circuit City Stores, Inc. (Circuit City) filed this action in the United States District Court for the District of Maryland, alleging that Circuit City engaged in racially discriminatory promotion practices in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1994). Johnson joined this suit prior to plaintiffs' filing of their second amended complaint, and in the second amended complaint, Johnson alleged that Circuit City engaged in discriminatory employment practices in violation of 42 U.S.C. § 1981. Johnson's position in the lawsuit is unique and different from that of the other plaintiffs in that she is the only plaintiff who was never employed by Circuit City, but rather, was merely an applicant for employment.

On November 20, 1996, prior to any discovery on Johnson's claim, Circuit City filed a motion for summary judgment seeking the dismissal of Johnson's claim on the basis that she was bound by an agreement to arbitrate any claims arising out of her application for employment. In her response, Johnson contended that the arbitration agreement was unenforceable because it lacked consideration, it was not a transaction involving interstate commerce, and it did not allow the arbitrator to award the relief granted by § 1981 or Title VII, thereby preventing her from vindicating her statutory rights. On May 30, 1997, the district court entered an order and memorandum opinion denying Circuit City's motion for summary judgment, holding that, under Maryland contract law,

the arbitration agreement was void for lack of consideration. Circuit City moved the district court to certify an appeal on its denial of summary judgment. The district court granted Circuit City's motion to certify the appeal pursuant to 28 U.S.C.A. § 1292(b) and we elected to hear it.

On appeal, Circuit City argued that the arbitration agreement was supported by sufficient consideration. In response, Johnson argued that the arbitration agreement was not supported by sufficient consideration and, in the alternative, was void because it was not a transaction involving interstate commerce, and it did not allow the arbitrator to award the relief granted by § 1981 or Title VII, thereby preventing her from vindicating her statutory rights.

On July 1, 1998, we held that the arbitration agreement was supported by sufficient consideration. For this reason, we vacated the district court's judgment. However, because the district court only ruled upon the issue of consideration, we declined to address Johnson's other challenges to the enforceability of the arbitration agreement. Consequently, we remanded the case to the district court for the limited purpose of considering Johnson's alternative grounds for challenging the enforceability of the arbitration agreement. *See* 28 U.S.C.A. § 2106 (West 1994); 16 Charles Allan Wright et al., *Federal Practice and Procedure* § 3937.1, at 697-712 (1996).

On remand, the district court, after rejecting all of Johnson's other objections to the enforceability of the arbitration agreement, held that the arbitration agreement was unenforceable because it failed to "provide [Johnson] with the

full set of remedies to which she would be entitled under Section 1981," and thus, shielded "Circuit City from the full force of Section 1981" and prevented Johnson from "vindicating her rights." (J.A. 262-63). Accordingly, the district court denied Circuit City's motion for summary judgment, and the case returned to this court.

Upon review of the briefs and the record, and after consideration of oral arguments, we conclude that the district court correctly denied Circuit City's motion for summary judgment for the reasons stated in its opinion. Accordingly, we affirm on the reasoning of the district court. *See Derrickson v. Circuit City Stores*, Civ. A. No. DKC 95-3296 (D. Md. Mar. 19, 1999).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REGINALD DERRICKSON, et al.	:	
v.	:	Civil Action No. DKC 95-3296
CIRCUIT CITY STORES, INC.	:	

MEMORANDUM OPINION

This employment discrimination case comes before the court on Defendant's motion for summary judgment. Defendant claims that the court should grant summary judgment against Plaintiff Demeka Johnson because Plaintiff Johnson signed an arbitration agreement which precludes her from bringing her cause of action. The court ruled on the pending motion once before. In an opinion and order dated May 30, 1997, the court concluded that Defendant's motion for summary judgment must fail because the arbitration agreement was unsupported by consideration. The court certified that decision for interlocutory appeal, and on July 1, 1998, the Court of Appeals for the Fourth Circuit vacated this court's prior decision and remanded the matter for further consideration. On remand, the court concludes that the arbitration agreement fails to provide all the remedies provided by Section 1981 and

therefore is unenforceable. Accordingly, the court denies Defendant's motion for summary judgment.

Also presently pending and fully briefed is Defendant's motion in limine to exclude the report of Plaintiff's Expert witness, Dr. James L. Medoff. The court grants in part and denies in part Defendant's motion in limine. No hearing is deemed necessary, and the court now rules pursuant to Local Rule 105.6.

I. Background

Plaintiff is an African-American female and a resident of Beltsville, Maryland. On September 6, 1995, Plaintiff filled out, signed and submitted an application for employment at Defendant's Beltsville store. The application included the following arbitration provisions:

> Dispute Resolution Agreement -- This agreement requires you to arbitrate any legal dispute related to your application for employment or employment with Circuit City. Circuit City will not consider your application unless this agreement is signed.
>
> * * *
>
> **The Dispute Resolution Agreement and the Dispute Resolution Rules and Procedures affect your legal rights. You may wish to seek legal advice before signing this Dispute Resolution Agreement.**

I have read this Agreement and understand that I should read the Dispute Resolution Rules and Procedures over the next few days.

I understand that I may withdraw my consent to this Agreement within three (3) days from the date on which I sign below by notifying the Applicant Screening Department in writing (including my Social Security number and the name of the place at which I applied for employment) that I am withdrawing my application for employment at Circuit City.

* * *

I understand that by so notifying the Applicant Screening Department, I will not be bound to this Agreement and that I no longer will be eligible for employment at Circuit City. I recognize that if I sign the Agreement and do not withdraw within three days of signing I will be required to arbitrate any and all employment-related claims I may have against Circuit City, whether or not I become employed by Circuit City.

This Agreement will be enforceable throughout the application process, my employment, and thereafter with respect to any claims arising from or relating to my application or candidacy for employment, employment or cessation of employment with Circuit City. I then must arbitrate all my employment-related claims, and I may not file a lawsuit in court.

Directly beneath Plaintiff's signature appeared the following:

> Circuit City agrees to follow this Dispute Resolution Agreement and the Dispute Resolution Rules and Procedures in connection with the Associate whose signature appears above.

This last provision was signed by a representative of Circuit City.

Plaintiff was employed full-time by another company when she applied with Circuit City. In response to her application, Defendant offered Plaintiff seasonal part-time employment at the Beltsville store where she wished to work or, alternatively, offered to forward her application to other Circuit City stores. Plaintiff rejected these offers and was never employed by Defendant.

When Defendant's motion was originally before this court, the court concluded that the arbitration agreement was invalid because it was unsupported by consideration. The court observed that, while Plaintiff was obliged to submit her grievances to arbitration, Defendant was not. Moreover, Defendant was not even obliged to consider Plaintiff's application for employment. In essence, the court held that Plaintiff promised to arbitrate her grievances and Defendant promised nothing in return. On interlocutory appeal, the Fourth Circuit disagreed and concluded that Defendant had promised to be bound by the arbitrator's rulings. The court of appeals further held that Defendant's promise to abide by the arbitrator's ruling was adequate consideration to support the

agreement. The matter returns to this court for consideration of Plaintiff's other objections to arbitration.

II. Defendant's Summary Judgement Motion

A. Summary Judgment Standard

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). In other words, if there clearly exist factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party, then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). The moving party bears the burden of showing that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *Pulliam*, 810 F.2d at 128 (citing *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)).

When ruling on a motion for summary judgment, the Court must draw all reasonable inferences in favor of and construe the facts in the light most favorable to the non-moving part. *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 437 (4th

Cir. 1998. A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. [A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence. *Anderson*, 477 U.S. at 256.

In *Celotex Corp.*, the Supreme Court stated:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file. Such a motion, whether or not accompanied by affidavits, will be made and supported as provided in this rule, and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.

Celotex Corp., 477 U.S. at 324. However, 'a mere scintilla of evidence is not enough to create a fact issue.' *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting *Seago v. North Carolina Theaters, Inc.*, 42 F.R.D. 627, 632 (E.D.N.C. 1966), *aff'd*, 388 F.2d 987 (4th Cir. 1967)). There

must be sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50 (citations omitted).

B. Analysis

The federal courts have long recognized that the Federal Arbitration Act (FAA) embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Pursuant to that policy, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.] *Id.* Defendant contends that Plaintiff voluntarily agreed to arbitrate her employment-related disputes with Circuit City and should be held to her agreement.

1. Applicability of the Federal Arbitration Act

Plaintiff argues that the federal policy favoring arbitration does not apply to the facts of this case because Section 1 of the FAA exempts employment contracts from its coverage. Section 1 of the FAA specifically excludes contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce. 9 U.S.C. § 1. The exclusion in Section 1, however, only applies to those workers involved in the interstate transportation of goods. *Kropfelder v. Snap-On*

Tools Corp., 859 F. Supp. 952, 958 (D. Md. 1994). The job for which Plaintiff applied was not related to the interstate transportation of goods, and therefore does not fall within Section 1's exclusion.

Plaintiff also argues that Defendant is not entitled to the FAA's favorable presumption because the arbitration provision at issue here is not a valid and enforceable contract. Plaintiff argues that there was no contract in this instance because Circuit City's application was just that -- an application -- and not a contract for employment. Plaintiff's argument runs parallel to her claim that the arbitration agreement was unsupported by consideration, and the Fourth Circuit's opinion in this case refutes Plaintiff's position. In essence, there was a contract in this case -- Plaintiff agreed to arbitrate her employment-related grievances with Defendant and, in return, Defendant agreed to live with the rulings of the arbitrator. That minimal agreement to arbitrate is enough of a contract to implicate the provisions of the FAA. *See Cherry v. Wertheim Schroder and Co.*, 868 F. Supp. 830, 835 (D.S.C. 1994) (where applicant failed application test and was not hired, court held that the express language of the application put plaintiff on notice that she was agreeing to be subject to [arbitration] by the mere execution of the application form.); *Townsend v. Smith Barney Shearson, Inc.*, 906 F. Supp. 153, 156 (W.D.N.Y. 1995) (plaintiff was bound to arbitrate upon submission of her signed application).

2. *Applicability of the Arbitration Provision*

Next, Plaintiff contends that the arbitration provision indicates that the parties only intended it to apply if Defendant hired Plaintiff. To support her argument, Plaintiff points to the language of the arbitration provision, which states that the provision will be enforceable throughout the application process, my employment, and thereafter and requires the applicant to arbitrate all my employment-related claims. Plaintiff makes the most of what little ambiguity there is in the arbitration provision, but her efforts are to no avail.

The construction of a written contract is, in the first instance, a question of law for the Court. *Suburban Hosp. v. Dwiggins*, 324 Md. 294, 306, 596 A.2d 1069 (1991). Initially, the Court must decide whether or not the contract is ambiguous. *Post v. Bregman*, 112 Md. App. 738, 750, 686 A.2d 665 (1996), *rev'd on other grounds*, 349 Md. 142 (1998). In doing so, the Court gives the words of the contract their plain meaning. *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 389, 488 A.2d 486 (1985). If the contract, is susceptible to a clear and unambiguous understanding, its construction is for the Court to determine. *Rothman v. Silver*, 245 Md. 292, 296, 226 A.2d 308 (1967).

Circuit City's application makes it quite clear that it applies both to applicants and employees alike. The application states that I [the applicant] recognize that if I sign the Agreement and do not withdraw within three days of signing I will be required to arbitrate any and all employment-related claims I may have against Circuit City, *whether or not I become*

employed by Circuit City. (Emphasis added). That language is unambiguous. Moreover, the fact that the application speaks in terms of employment-related claims' provides further evidence that the arbitration provision applies to applicants. Arguably, if Circuit City had used the term employment claims , the arbitration provision might have only applied to employees. Instead, Circuit City chose to use the more general term employment-related claims. There can be no doubt that a decision not to hire an applicant is employment-related.

Likewise, Plaintiff claims that the Dispute Resolution Rules & Procedures, which were incorporated into the arbitration provision by reference, only apply to Circuit City employees. In support of that claim, Plaintiff first notes that the rules speak exclusively in terms of Associates , the term Circuit City uses to refer to its employees. Second, Plaintiff observes that, of the remedies provided for in the rules, all but compensatory damages are tied to employment with Circuit City.

Neither of these details changes the fact that the Circuit City application clearly applies the Rules & Procedures to applicants as well as employees. In the application, Defendant uses the term Associate generically to refer both to applicants and employees. Specifically, the application states that :

> Circuit City agrees to follow this Dispute Resolution Agreement and the Dispute Resolution Rules and Procedures in connection with the Associate whose signature appears above.

Because this passage refers to the as-yet unhired applicant, it is clear that Defendant meant for the term Associate to refer to both applicants and employees. Moreover, to the extent there is any ambiguity in the term Associate , it does not overcome the application's clear expression that the arbitration provision applies to an applicant whether or not [he or she] becomes employed by Circuit City.

As for the remedies available to applicants, Plaintiff exaggerates the limitations imposed by the Rules & Procedures. Rule 14 states that an Associate, meaning either applicant or employee, is entitled to injunctive relief without limitation, full or partial back pay, compensatory damages, and punitive damages equal to any award of back pay and compensatory damages or $5,000, whichever is greater. The only provision of Rule 14 that does not apply to an applicant is reinstatement. Nor is that surprising. If an Associate was not employed by Circuit City in the first place, obviously he or she cannot be reinstated.

3. *Enforceability of the Arbitration Provision*

While Plaintiff exaggerates the limitations imposed on her remedies, she is correct that she does not have all the remedies under the arbitration agreement that she would have under Section 1981. Specifically, Circuit City's Dispute Resolution Rules & Procedures allow only one year of back pay and place a cap on any award of punitive damages. In contrast, Section 1981 provides for back pay going back up to three years from the filing of the suit and punitive damages without

limitation. *See Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (plaintiff can recover punitive damages under Section 1981); *Howell v. General Elec. Co.*, 836 F.2d 1342, 1988 WL 1045 at *2 (4th Cir. 1988) (Maryland's general three-year statute of limitations governs claims pursuant to Section 1981); *Kornegay v. Burlington Indus., Inc.*, 803 F.2d 787, 788 (4th Cir. 1986) (plaintiff can recover back pay under Section 1981 back to the limit of the applicable statute of limitations).

Plaintiff correctly contends that the Circuit City arbitration provision is unenforceable because it does not provide her with the full set of remedies to which she would be entitled under Section 1981. The Supreme Court has made clear that statutory claims can be arbitrated. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The Court pointed out, however, that:

> by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; [he or she] only submits to their resolution in an arbitral, rather than a judicial forum.

Id. (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The *Gilmer* Court further recognized that statutory causes of action are often meant not only to address individual grievances but also to further important social policies. *Gilmer*, 500 U.S. at 27. The Court concluded that an agreement to arbitrate a statutory cause of action is valid if the prospective litigant effectively may

vindicate [his or her] statutory cause of action in the arbitral forum. *Id.* at 28.

Punitive damages and back pay are powerful deterrents to employers who might otherwise discriminate on the basis of race. The failure of the Circuit City arbitration provision to provide those remedies shields Circuit City from the full force of Section 1981 and prevents Plaintiff from effectively vindicating her rights. Therefore, the provision is invalid. *See Shankle v. B-G Maint. Management*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (refusing to compel arbitration where provision required plaintiff to pay one-half of arbitrator's fee); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (refusing to compel arbitration where provision deprived plaintiff of Title VII damages); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-85 (D.C. Cir. 1997) (observing that arbitration agreement would be invalid if it required Title VII plaintiff to pay all or part of arbitrator's fees); *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1994) (refusing to compel arbitration where provision deprived plaintiff of statutorily mandated exemplary damages). Accordingly, this Court will not compel Plaintiff to arbitrate her claims against Defendant.

III. Defendant's Motion in Limine

Defendant has also moved for the exclusion of Plaintiffs' expert, Dr. James L. Medoff. Dr. Medoff submitted his expert report as required by Fed. R. Civ. P. 26(a)(2). In his report, Dr. Medoff presented various tables regarding compensation and promotions at Circuit City, and he based his

opinion in part on the information in those tables. That information, however, is not the raw data produced by Circuit City. Instead, the tables are based on data that was subjected to various selection, aggregation and weighting processes performed by Dr. Medoff's assistant. Dr. Medoff testified at deposition that he told his assistant in general terms what manipulations and analyses he wanted performed on the data. His assistant then wrote a series of computer instructions using a commercially available statistics program that analyzed the data and produced the tables upon which Dr. Medoff relied.

The court need not waste its time analyzing the work of Dr. Medoff's assistant as the work of a so-called non-testifying expert. Dr. Medoff and his assistant worked hand-in-glove, and the fruits of their labor are indivisible. Defendant cannot properly cross-examine Dr. Medoff without first understanding how his assistant manipulated the data. This is not a case where the testifying expert relied on a single, discrete written report by a non-testifying expert. If that were so, Plaintiffs would simply need to produce the non-testifying expert's report. To the contrary, Dr. Medoff's opinions in this matter are the result of a seamless collaboration with his assistant. Under these circumstances, Defendant is entitled to know what Dr. Medoff's assistant did.[1]

Even if the court considered Dr. Medoff's assistant to be a non-testifying expert, the results would be the same.

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[1]Indeed, under these circumstances, the Court is inclined to think that Defendant cannot only obtain the underlying data but can also depose and cross-examine Dr. Medoff's assistant at trial. That question, however, has not been raised by the parties, and the court does not rule on it.

Defendant is not engaging in the sort of freeriding that Rule 26(b)(4)(B) was meant to prevent. The purpose of Rule 26(b)(4)(B) is to prevent a party from building its own case through its opponent's diligence. *Good v. GAF Corp.*, 875 F.2d 315, 1989 WL 54017 at *3 (4th Cir. May 23, 1989). In this instance, Defendant does not seek to build its own case with Dr. Medoff's work but rather seeks to tear down Plaintiffs' case. That is entirely proper. Moreover, Rule 26(b)(4)(B) provides that the facts known and the opinions held by an expert . . . who is not expected to be called at trial are discoverable upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. Only Dr. Medoff's assistant knows what he did to the data, and because that information is exclusively within the assistant's cognizance, Defendant is entitled to it under Rule 26(b)(4)(B). *See Matter of Interco Inc.*, 146 B.R. 447, 450 (Bankr. E.D. Mo. 1992)

Plaintiffs protest that the computer program used by Medoff's assistant is commercially available and that Defendant can obtain a copy and perform the analysis itself. Plaintiffs' argument borders on the ridiculous. It is like saying that you can know the contents of a novel simply by knowing what model typewriter the author used. Defendant is entitled to know precisely how the data was manipulated, and that requires Plaintiffs to disclose the instructions that Dr. Medoff's assistant entered into the program. Only then can Defendant properly prepare to cross-examine Dr. Medoff.

Defendant requests that the court exclude Dr. Medoff's testimony pursuant to Fed. R. Civ. P. 37(c)(1). Exclusion is a harsh sanction. *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 504 (D. Md. 1997). Moreover, Rule 37(c)(1) only calls for exclusion where the failure to disclose was without substantial justification. While the court did not find Plaintiffs' view convincing, it also does not find it so frivolous as to be without substantial justification. Therefore, the court concludes that the appropriate remedy for Plaintiffs' failure to turn over Dr. Medoff's underlying analysis is to require disclosure and provide another opportunity to depose Dr. Medoff.

IV. Conclusion

For the reasons stated above, Defendant's motion for summary judgment is denied and Defendant's motion to exclude the testimony of Dr. Medoff is granted in part and denied in part. A separate order will be entered.

/s/

DEBORAH K. CHASANOW
United States District Judge

March 19, 1999.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REGINALD DERRICKSON, et al.	:	
v.	:	Civil Action No. DKC 95-3296
CIRCUIT CITY STORES, INC.	:	

ORDER

In accordance with the accompanying Memorandum Opinion, IT IS this 19th day of March, 1999, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendant Circuit City's motion for summary judgment BE, and the same hereby is, DENIED;

2. Defendant Circuit City's motion to exclude the testimony of Dr. James L. Medoff BE, and the same hereby is, GRANTED in part and DENIED in part;

3. Plaintiff SHALL disclose the details of any analysis performed and supporting documentation created by Dr. Medoff's assistants in the course of preparing Dr. Medoff's expert report and testimony, including but not limited to the computer instructions used to manipulate the data later analyzed by Dr. Medoff; and

4. The clerk is directed to mail a copy of this Order and the accompanying Memorandum Opinion to counsel for the parties.

/s/

DEBORAH K. CHASANOW
United States District Judge